Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Implementation of the Telecommunications Act of 1996:	)	CC Docket No. 96-115
	)	
Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information	)	
	)	
Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended	)	CC Docket No. 96-149

COMMENTS OF U S WEST COMMUNICATIONS, INC.

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May 8, 1998

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I. INTRODUCTION AND SUMMARY: U S WEST SUPPORTS THE REQUESTS FOR DEFERRALS AND FORBEARANCE RECENTLY FILED WITH THE COMMISSION

U S WEST Communications, Inc. ("U S WEST") supports both the Request for Deferral and Clarification filed by the Cellular Telecommunications Industry Association ("CTIA") on April 24, 1998,[1] and the Petition for Temporary Forbearance or, In the Alternative, Motion for Stay filed by GTE Service Corporation ("GTE") on April 29, 1998.[2] Both were recently put out for comment

[1] CTIA Request for Deferral and Clarification, filed herein Apr. 24, 1998 ("CTIA Request").

[2] Petition for Temporary Forbearance or, In the Alternative, Motion for Stay, filed herein Apr. 29, 1998 by GTE Service Corporation, and its Affiliated Domestic Telecommunications, Wireless, and Long Distance Companies ("GTE Petition").

through a Federal Communications Commission ("Commission") Public Notice.[3]

Both the CTIA and GTE make a compelling case why the Commission should defer the effective date of (CTIA request for relief) or forbear from requiring compliance with (GTE request for relief) certain of the Customer Proprietary Network Information ("CPNI") rules established in the Second Report and Order.[4] Certainly, as both GTE and the CTIA persuasively argue, such action should be taken with respect to Commercial Mobile Radio Services ("CMRS") and the integrated offering of customer premises equipment ("CPE") and enhanced services with CMRS offerings. However, as made clear by GTE, the logic of the arguments are not confined to CMRS providers or offerings. Nor should any Commission-granted relief be so confined. Rather, the deferment or forbearance should extend to all telecommunications carriers.

While the CTIA seeks to distance its request for relief from its relevancy to landline providers, it is obvious that many of the arguments it makes are as applicable to landline service providers as to CMRS providers. Indeed, GTE persuasively argues for forbearance of the Commission's CPNI rules regarding CPE and information services in a landline, as well as a wireless, environment. As

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[3] Public Notice, Pleading Cycle Established for Comments on Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Information Request for Deferral and Clarification, CC Docket No. 96-115, DA 98-836, rel. May 1, 1998.

[4] In the Matter of Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information, CC Docket No. 96-115, Second Report and Order ("Second Report and Order") and Further Notice of Proposed Rulemaking, FCC 98-27, rel. Feb. 26, 1998.

demonstrated more fully below, customers of all carriers have built up a market expectation that allows for the simple, efficient purchase of telecommunications services, as well as CPE and enhanced services, in a single transaction. That market expectation should not be disrupted with respect to any category of customer until the Commission concludes its reconsideration process.

Additionally, U S WEST supports GTE's request for forbearance regarding the use of CPNI for those customers who purchase packages, to allow for marketing of upgrades or changes to those packages, even if the "new" package might contain a service associated with a "bucket" not currently contained in the subscribed-to package.[5] As GTE persuasively argues, customers who buy packages most especially do not consider their service subscription to be "bucket-defined," and expect that different package configurations will be offered to them over time. Because the Commission's construction of Section 222(c)(1) did not really address this particular aspect of a customer's service subscription expectations, the Commission should forbear from requiring that its rules be applied to such a situation prior to a reconsideration of the matter.

Both CTIA and GTE demonstrate that a deferral of the current effective date of certain of the rules should be granted so that the Commission has a full and fair opportunity to address the predictable Petitions for Reconsideration that will be filed with respect to its Second Report and Order.[6] While CTIA argues that, absent

[5] GTE Petition at 23-27.

[6] CTIA Request at 4 (stating that its members will be filing such Petitions); GTE Petition at 1-2 (indicating GTE's determination to file a Final Relief Petition).

the deferral, the "current deadline would thus force wireless providers to disrupt their pro-competitive marketing efforts, even though they may ultimately obtain relief through reconsideration or forbearance,"[7] such is true not just with respect to wireless but wireline carriers as well.[8]

From a procedural perspective, as both GTE and CTIA demonstrate, the Commission is fully empowered to defer the effective date of its Second Report and Order, and there is Commission precedent for taking such action.[9] Indeed, the Common Carrier Bureau is authorized to take such action on delegated authority in the event that the public interest so demands.[10] Clearly, the public interest does so demand since a May 26, 1998 effective date will clearly negatively impact the *status quo* with regard to customer contacts, customer care, and the quality relationship customers have come to expect from their supplying carriers.

While the Commission's Second Report and Order is crafted first and foremost as an articulation of legislative expressed intent,[11] it also makes clear that there are a number of possible interpretations of the statutory language.[12] For over

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[7] CTIA Request at 4. And see id. at 8 ("Absent a change of the effective date, however, CMRS providers must radically alter longstanding marketing efforts now, even if petitions for reconsideration are filed.").

[8] See GTE Petition, generally.

[9] See GTE Petition at 3-6; CTIA Request at 8-12. As CTIA makes clear, even if the Commission were to require the four-part showing required for injunctive or stay relief, CTIA's Request would meet that required showing. CTIA Request at id. and n.10. And see GTE Petition at 5-6.

[10] CTIA Request at 11-12.

[11] Second Report and Order ¶ 4.

[12] See, e.g., Second Report and Order ¶¶ 35, 87, 94, 160.

two years, carriers have operated under the self-effectuating nature of Section 222 in a manner that compromised no customer's reasonable expectation of privacy. Nor did carriers' compliance produce a negative impact on their relationship with their customers or the quality provision of customer service. The Commission's Second Report and Order, however, requires a radical change to the carrier-customer relationship and the quality provision of service. To the extent the Commission requires express affirmative consent for carriers to use CPNI for sales of basic telecommunications services outside current "categories" of a customer's subscription and requires similar consent for use of CPNI to sell CPE[13] or enhanced services, the Commission's rules call for a "sea change" in both carrier practices and customers' experiences. The Commission's rules insinuate artificial market classifications and stratifications into the supplier-consumer relationship and result in stylized, legal notifications intruding into what otherwise would be conversational, consultative speech.

Furthermore, the process of securing approvals is formidable, to say the least. Securing customer approvals one customer at a time from customer bases in the millions (which is what must be done if a carrier desires to market services across buckets or in packages using CPNI) involves a significant amount of time and money, allowing a carrier to only very slowly build up a cache of "broad CPNI

[13] As GTE points out, the Commission has itself left open the possibility that policy considerations might support the sale of CPE utilizing CPNI. GTE Petition at 13-14, citing to ¶ 77 of the Second Report and Order. Should the Commission reach such a conclusion on reconsideration, the Commission would be free to implement the policy utilizing a Section 10 forbearance model. Id. at 4.

approvals" such that meaningful joint marketing and tailored offerings can once again respond to customers' expectations. To the extent the Commission determines on reconsideration that CPE (at least some) and enhanced services (at least some) do come within the language of permitted CPNI uses under Section 222(c)(1)(B), the need to secure some of the potential millions of express approvals will decrease. For hundreds of thousands of customers, the "barrier" to comfortable efficient customer service and care will have been eliminated and carriers will be able to target their "approval" efforts (whatever they are at the end of the reconsideration process) in a more focused manner.

Rather than institute the full-force of the express approval barrier immediately, the Commission should grant the requested relief sought by CTIA and GTE and forbear from its institution until the reconsideration process has run its course. During the past two years, customers' privacy expectations have not been compromised. Nor has there been any demonstration of harm. Forbearing from application of the Commission's rules for some additional time will not result in either phenomena. Rather, it will simply assure that customers' experiences will remain as they have come to expect. For these reasons, U S WEST supports the requests for relief requested by GTE and CTIA.

II. DEFERRAL OR FORBEARANCE SHOULD BE GRANTED WITH RESPECT TO CMRS PROVIDERS

Both CTIA and GTE make a compelling case for deferral of the CPNI rules for CMRS providers, particularly with respect to the provision of CPE and information services. As both CTIA and GTE argue, mobile stations are integral to

the provision of wireless services and are incorporated into the providers' service expectations and licensing requirements.[14] Thus, even if there were any lack of clarity around whether CPE -- in general -- meets the requirements of Section 222(c)(1)(B), equipment associated with mobile services clearly meets the statutory requirement for inferred customer approval regarding CPNI use.

As CTIA and GTE persuasively argue, the nature of the CMRS provisioning experience is that network transmission, equipment and information services, as well, are bundled into a single service package.[15] Customers have come to expect this type of offering and will be nothing less than totally confused if their service ordering process now is either prefaced or extended by a type of Miranda-warning CPNI notification.[16] Thus, the Commission's CPNI rules regarding the provision not only of CPE but information services in a CMRS context should be deferred.

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[14] CTIA Request at 29-35; GTE Petition at 9-10.

[15] CTIA Request at 3-4; GTE Petition at 9-10, 11, 19-22.

[16] Compare CTIA Request at 25-26 ("A carrier which is forced to read the customer the required litany of rights and obligations before it can access CPNI and before it can even advise the customer of the purpose of the call obviously stands little chance of retaining the customer." (underline in the original)). While the Commission's Second Report and Order makes clear that notifications need not necessarily occur before speech occurs, there is no comfortable moment in a carrier-customer conversation for the type of "notification" the Commission mandates. The communication is bureaucratic and off-putting. No reasonable customer would be expected to sit through such communication in order to learn about, let alone assess, the value to them from the use of the information.

III. A DEFERRAL OR FORBEARANCE SHOULD NOT BE CONFINED ONLY TO CMRS PROVIDERS BUT TO ALL CARRIERS

It would be inappropriate, however, to defer the effective date of the CPNI rules, or forbear from their application only for wireless carriers.[17] As the GTE Petition makes clear, at least with respect to the use of CPNI in the context of CPE and enhanced services sales, the burdens the Commission's rules impose on landline carriers is no less severe for them than for wireless carriers.[18] In this regard, it is incorrect to argue -- as CTIA does -- that CPE and information services, or "basic" and "adjunct to basic," are "landline concepts."[19] They are regulatory concepts, applied differently by federal regulatory authority to landline and CMRS offerings. Both their past and future relevancy to carrier-customer relationships, where such categorizations are generally "unnatural demarcation[s],"[20] was basically dismissed by the Commission with respect to both landline and CMRS providers.

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[17] CTIA argues that the deferral it seeks is being made because of lack of record evidence regarding CMRS and customer expectations. CTIA Request at 14, 20-21, 36. However, it is incorrect to state that the Commission had no evidence in this regard. Airtouch made numerous filings in this proceeding and participated through additional *ex parte* contacts, as well. Yet, it appears that CTIA seeks its relief on behalf of Airtouch as well as its other members. See id. at 27 (CTIA "seeks this relief on behalf of all its members.").

What is correct, however, is that the Airtouch advocacy was fundamentally at odds with existing commercial practice, reasonable customer expectations, and the quality provisioning of service to customers.

[18] GTE Petition at 7-8, 19, 22-23.

[19] CTIA Request at 7, 13, 21-22.

[20] Id. at 18. And see GTE Petition at 20 ("Only a handful of customers could ever distinguish the legal categories for vertical services -- which of them are 'telecommunications' versus which are not.").

Whether talking about a CMRS provider or some other telecommunications carrier, the Commission's interpretation of Section 222, which is clearly not compelled by the statutory language, "undermines carriers' abilit[ies] to differentiate their offerings, frustrates customers' access to improved . . . services, and impairs wider use of new technologies -- all counter to Commission objectives."[21] Thus, while the "form" of the burden as between CMRS and other telecommunications carriers might differ, the impact on the carrier-customer relationship is just as negative.

For example, CTIA argues that "CMRS providers have never been subject to restrictions on their use of CPNI"[22] and have always packaged CPE and information services in their offerings.[23] CTIA neglects to acknowledge that most local exchange carriers ("LEC") in the United States were also never subject to CPNI restrictions. And, even those that were so encumbered have historically provided their customers with packaged offerings through a one-stop shopping environment,[24] leaving the regulatory "impact" associated with the regulatory classifications to be taken care of at the back end of the transaction (i.e., through accounting methodologies). With respect to the "mass market," the Commission's current CPNI rules are no less devastating to most LECs, including those carriers previously

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[21] CTIA Request at 18.

[22] Id. at 5.

[23] Id. at 7, 12, 15-17, 20 (noting the Commission's endorsement of this conduct as advancing consumer interests).

encumbered by CPNI restrictions, than to CMRS providers. Just as CTIA asserts that CMRS providers will have to "construct [affirmative CPNI approval] programs from scratch"[25] so too will other carriers be burdened by this obligation.[26] Thus, the impact on customers served by RBOCs and GTE will be no less severe than for customers of CMRS providers.

Furthermore, while the mobile stations CTIA and GTE argue should meet the requirements of Section 222(c)(1)(B) clearly should be held to meet the statutory mandate, other types of stations/equipment should, as well. This is particularly true with regard to "specialized" CPE such as Caller ID CPE, PBXs, ADSL modems, and other types of equipment.[27] Such CPE is no less "essential to receiving . . . service" than the digital mobile stations CTIA and GTE reference.[28] And, in the end, no less of a "wall" is created by the Commission's rules regarding "the use of CPNI to sell a customer [mobile] digital services"[29] than is created with respect to certain landline services.

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[24] GTE Petition at 20-23. Those companies that were subject to previous CPNI restrictions did not generally suffer commercial or market harm from the restrictions the Commission imposed. See id. at 11.

[25] CTIA Request at 14.

[26] The only CPNI experience the RBOCs/GTE have that is different from other telecommunications carriers with respect to the securing of affirmative approvals from customers has been the CPNI affirmative approval requirement for business customers with more than 20 lines. However, the nature of the relationship between the carrier and the customer in that context rendered the securing of consent not impossible; and, once secured, the relationship proceeded then encumbered only by the downstream accounting obligations.

[27] See GTE Petition at 2, 8-9, 15-18.

[28] CTIA Request at 7, 19; GTE Petition at 14.

In both cases, the Commission's rules "make[ ] no sense and clearly disserve[ ] customers' interests."[30] In both cases, the Commission should be educated by the "functionally related" concepts which CTIA argues should be engrafted onto any Section 222(c)(1) interpretation.[31]

Essentially, the Commission's rules not only "drive a wedge through CMRS providers' longstanding integrated marketing efforts"[32] but through the historical integrated marketing efforts of landline carriers, as well as the promise of joint marketing as permitted under the Telecommunications Act. In both regards, the Commission's rules force carriers "to segregate their marketing of equipment and the wide array of features and services they offer,"[33] "ignore[ ] the technical reasons and consumer expectations that have led to the high degree of integration" of carrier services,[34] and "conflict[ ] with the Commission's own prior findings as to the benefits to competition and consumers that flow from integrated . . . offerings."[35] For these reasons, any deferral of the effective date of the rules should run in favor not just of CMRS providers but all telecommunications carriers.

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[29] CTIA Request at 17.

[30] Id.

[31] Id. at 37 (CPE), 38 (information services).

[32] Id. at 2, 15.

[33] Id. at 15.

[34] Id. And see In the Matter of Implementation of Section 255 of the Telecommunications Act of 1996; Access to Telecommunications Services, Telecommunications Equipment, and Customer Premises Equipment by Persons with Disabilities, WT Docket No. 96-198, Notice of Proposed Rulemaking, rel. Apr. 20, 1998 ¶ 30 ("technological developments have resulted in a convergence between telecommunications equipment and services").

IV. U S WEST SUPPORTS GTE'S REQUEST FOR FORBEARANCE REGARDING THE USE OF CPNI IN THE PROVISION OF SERVICE PACKAGES

The Commission's Second Report and Order has the potential to be particularly pernicious with respect to packaged offerings, where the original package may incorporate service offerings in only one or two buckets, but an upgraded offering may include offerings in all three (or two of three) telecommunications buckets and include "other" offerings (such as CPE, information services, cable, etc.). As GTE correctly points out, "[c]ustomers will expect and desire that the carrier use their CPNI from the initial package to inform them of this potentially much more attractive package."[36] Indeed, an argument can be made that a "truth in offering" approach to service provisioning requires that the individual receiving the first package be advised that they can receive those or similar services, and perhaps more, in a different package at the same or potentially reduced prices.[37]

For all the reasons articulated by GTE, the Commission should forbear from enforcing its CPNI rules, utilizing a rigid "bucket" structure, in the context of service packages. Pending the final determination on this matter in the reconsideration process, the public will not be harmed by considering the "package"

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[35] CTIA Request at 15-16.

[36] GTE Petition at 25.

[37] "Even if an enhancement to an initial (or partial) package involves adding a service from another category, the customer will continue to consider the relationship with the carrier to be defined by the package itself, not by the regulatory categorization of the package's components." Id. at 25.

as a unit regarding which CPNI can be used to change or modify the package components.

V. U S WEST UNDERSTANDS CTIA'S REQUEST FOR CLARIFICATION BUT BELIEVES THE MORE APPROPRIATE ACTION WITH RESPECT TO WIN-BACK COMMUNICATIONS IS TO FORBEAR FROM APPLICATION OF THE RULES IN THIS CONTEXT, AS PROPOSED BY GTE, AND TO SUBSTANTIVELY ADDRESS THE MATTER ON RECONSIDERATION

A. Name And Address Information

U S WEST supports this aspect of the CTIA Request, wherein CTIA asks that the Commission clarify that name and address information is not CPNI.[38] This approach is consistent with the Commission's previous CPNI rules. We continue to support this position.

B. Win-Back Conduct

Undoubtedly, there will be Petitions for Reconsideration filed regarding the Commission's rules on win-back communications. As CTIA correctly points out, this "issue" was not a part of the Notice of Proposed Rulemaking.[39] And, the Order addresses the item almost as an afterthought.[40] This is not terribly surprising, since the matter of win-back communications has actually been the subject of some comment in a different proceeding.[41]

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[38] CTIA Request at 4, 41-42.

[39] Id. at 40.

[40] Id. (noting that the Order spends only three sentences addressing the matter).

[41] The discussion of win-back communications has primarily occurred within the context of the Commission's slamming proceedings, where certain interexchange carriers have argued that such communications are somehow improper, whereas other carriers argued that, properly constrained, such communications were not only lawful but in the public interest. See, e.g., Comments of U S WEST to Notice

As CTIA correctly argues, the Commission's win-back rule is a blatant restraint of trade.[42] This is true whether it is imposed before a customer leaves a carrier or after. And, in either event, the Commission's current interpretation of Section 222 in a "win-back" context is neither compelled by the language of the statute nor sound policy.[43] Thus, deferring the effective date of this rule (or forbearing from applying it) until the reconsideration process is concluded would be in the public interest. The scant record on this matter renders such a deferral all the more appropriate.

U S WEST urges the Commission not to "clarify" its proposed win-back rule prior to addressing the matter on reconsideration. Because few parties have commented on the matter, it is possible that granting CTIA the relief it requests would simply create other problems. For example, CTIA argues that the Commission should clarify that carriers can use CPNI to win-back customers before they leave a carrier, leaving the rules apparently intact with respect to a customer that has actually left.[44] However, because an incumbent LEC may not have the unfettered freedom to contact a customer before that customer actually disconnects

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of Proposed Rule Making and Petition for Reconsideration of Memorandum Opinion and Order on Reconsideration, CC Docket No. 94-129, filed Sep. 15, 1997 at 22, 25 n.55; Reply Comments of U S WEST, CC Docket No. 94-129, filed Sep. 29, 1997 at 20-22 ("U S WEST Slamming Reply").

[42] CTIA Request at 3. And see id. at 7-8. Not only is the rule a restraint of trade, but it presents constitutional implications, as well. See GTE Petition at 31-32.

[43] See GTE Petition at 28-31.

[44] CTIA Request at 42-43.

service,[45] the only opportunity such a LEC may have for a win-back communication is after the customer has totally left the carrier.[46] Whether before or after a customer leaves a carrier, a strong argument can be made that a carrier should have the ability to work with customers attempting to "leverage their ability to switch carriers by seeking progressively more attractive pricing, and [should have] access [to] CPNI in order to prepare competitive responses"[47] and to re-initiate or render service.[48] In either case, the communication promotes competition and the consumer welfare.

As it currently stands, however, whether one considers the applicability of the Commission's rule to a pre-disconnection or post-disconnection communication, the effect of the rule is the same: "Barring the use of CPNI in that situation would subvert [the] competitive process."[49] For these reasons, the Commission should defer the effective date of its rules regarding this item or forbear from regulatory enforcement of this provision until the reconsideration process has concluded.

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[45] Such communications have already been alleged by some carriers to be violations of Section 251 interconnection obligations. As GTE points out, seemingly in agreement with CTIA's basic interpretation of the rules as they now stand, neither the rule nor the statute would prohibit a communication with a customer about to leave a carrier. GTE Petition at 28. However, LECs may have different operational practices regarding a communication at this point in time.

[46] See U S WEST Slamming Reply at 20-22.

[47] CTIA Request at 43.

[48] See GTE Petition at 28-29.

[49] CTIA Request at 43. And see id. at 12 (noting that service providers' "efforts to retain customers who plan to switch to a competitor" often contribute to the reduction of prices to consumers), 23-25. See also GTE Petition at 30, 32 ("use of CPNI to win back the customer is clearly for the customer's benefit if it results in the customer continuing to obtain needed service at the best price.").

VI. CONCLUSION

For all of the above reasons, U S WEST supports CTIA's Request and GTE's Petition. As requested by CTIA, the Commission should defer for at least 180 days the effective date of its Second Report and Order rules. Alternatively, the Commission should announce a decision to forbear from enforcement of its rules until the reconsideration process is concluded.

The public interest certainly will not be harmed by such deferral. Section 222 was self-effectuating in 1996. To the extent that carriers deem their existing relationship with customers to form the foundation for an implied approval to use CPNI, or if they have engaged in some type of affirmative approval consent process, the consumers in the carrier-consumer relationship are suffering no statutory violation or discernible harm.

Against that backdrop of lack of public harm is the harm to the public that will undoubtedly occur if the Commission stands firm on its May 26, 1998 effective date of its CPNI rules. Given that carriers cannot by that time have secured the one-to-one type of affirmative consent the Commission mandates, the *status quo* customer expectations that the Commission itself has fostered around one-stop shopping and joint marketing, and which the Telecommunications Act endorses, should not have to come to an abrupt halt or be comprised by either statutory interpretations or policy decisions that are clear to be the subject of reconsideration.

The public interest demands more. It demands better. It demands the deferral of the Commission's rules.

Respectfully submitted,

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May 8, 1998

CERTIFICATE OF SERVICE

I, Rebecca Ward, do hereby certify that on this 8th day of May, 1998, I have caused a copy of the foregoing **COMMENTS OF U S WEST COMMUNICATIONS, INC.** to be served, via first-class United States Mail, postage prepaid, upon the persons listed on the attached service list.

Rebecca Ward

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